Supreme Court, U.S.
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No. 09-392

In The
Supreme Court of the United States

VIRGIL MORAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

JAMES E. FELMAN
KATHERINE EARLE YANES
Counsel of Record
KYNES, MARKMAN & FELMAN, P.A.
100 South Ashley Drive, Suite 1300
Tampa, Florida 33602
(813) 229-1118
KYanes@kmf-law.com

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT IN REPLY

I. The Eleventh Circuit's decision that notice is not required prior to the imposition of special conditions of supervised release creates a circuit conflict on an important matter and will deprive defendants of an opportunity to comment on a matter relating to an appropriate sentence.

Certiorari should be granted because this case presents an important issue that is likely to recur: whether notice must be afforded a defendant before the district court imposes special conditions of supervised release the defendant would not reasonably have expected. The Fifth, Seventh, Ninth, and Tenth Circuits have held that notice is required under such circumstances pursuant to Federal Rule of Criminal Procedure 32(i)(1)(C)'s requirement that defendants be afforded an opportunity to comment on "matters relating to an appropriate sentence" and this Court's holding in *Burns v. United States*, 501 U.S. 129, 135-36 (1991), that implicit in "the right to *comment* on" a matter related to sentencing is "the right *to be notified* that the court is contemplating such a ruling." *See* Pet. at 11-12, 14-17. In its opinion in this case, the Eleventh Circuit broke with every other circuit court of appeal that has considered this issue, holding that the Court's ruling in *Irizarry v. United States*, 128 S. Ct. 2198 (2008), that notice is not required prior to the imposition of a variance from the Sentencing Guidelines, *id.* at 2201-02, should be

extended to special conditions of supervised release. App. 10-11. The government argues in opposition to Moran's Petition that: (a) granting review would be premature because the opinions the Eleventh Circuit's decision conflicts with predate *Irizarry*, (b) the Eleventh Circuit's opinion was correct, and (c) this case would be an inappropriate vehicle to address the notice issue.

A. The conflict in the circuits persists post-*Irizarry*.

Moran discussed in the Petition the conflict between the Eleventh Circuit's decision and decisions of the Fifth, Seventh, Ninth, and Tenth Circuits. *See* Pet. at 14-17. Prior to this Court's decision in *Irizarry*, each of those circuits had held that notice is required before the imposition of a special condition that is not among the mandatory or discretionary statutory conditions of supervised release identified in 18 U.S.C. Section 3563 or United States Sentencing Guideline Section 5D1.3, is unusual, or is unrelated to the offense of conviction. *See* Pet. at 14-17.

The government does not dispute that the Eleventh Circuit's decision conflicts with the decisions Moran discussed. It asserts, however, that it would be premature for the Court to review the Eleventh Circuit's decision because "the other circuits may reconsider their prior positions in light of *Irizarry*." Opp'n at 9-10. To the contrary, in two recent Ninth Circuit opinions, the courts have cited the Ninth

Circuit's pre-*Irizarry* holding in *United States v. Wise*, 391 F.3d 1027 (9th Cir. 2004), that "[w]here a condition of supervised release is not on the list of mandatory or discretionary conditions in the sentencing guidelines, notice is required before it is imposed." *United States v. Watson*, 582 F.3d 974, 981 (9th Cir. 2009) (quoting *Wise*, 391 F.3d at 1033); *see also United States v. Camp*, 344 Fed. Appx. 431, 433 (9th Cir. 2009) (citing *Wise*, 391 F.3d at 1033). In neither of these recent opinions did the Ninth Circuit question the rule set forth in *Wise* or indicate any intention to overrule *Wise* based on *Irizarry*.

The government further argues that the conflict regarding the notice issue does not require the Court's attention because the issue has arisen in only a few cases post-*Irizarry*. The issue arose repeatedly pre-*Irizarry*, *see* Pet. at 14-17, 27-28, and has arisen at least five times in the circuit courts of appeal in the fewer than two years since *Irizarry* was decided – in this case, the two Fifth Circuit cases discussed in Moran's Petition in which the courts commented that the law regarding notice has become unclear, Pet. 27, and the two Ninth Circuit cases discussed above. Accordingly, the conflict regarding whether notice is required prior to the imposition of special conditions of supervised release persists and is ripe for the Court's attention.

B. The Eleventh Circuit's decision is incorrect.

Moran also argued in his Petition that the Eleventh Circuit's holding is an unwarranted extension of *Irizarry* and is inconsistent with the Court's holding in *Burns* and Rule 32(i)(1)(C)'s requirement that district courts allow the parties to comment on "matters relating to an appropriate sentence." Pet. at 18-27. As Moran explained, the Eleventh Circuit relied on the first of the three reasons *Irizarry* identified for holding that notice is not required prior to a variance – that defendants have no expectation subject to due process protection of a within-Guidelines sentence post-*Booker*. Pet. at 11, 19. The second and third reasons stated in *Irizarry*, however, do not hold up regarding unanticipated special conditions of supervised release. Pet. at 19-27. That is, unlike what the Court found to be true regarding variances from the Sentencing Guidelines, *Irizarry*, 128 S. Ct. at 2203-04, notice of unexpected special conditions is necessary to ensure that the parties have an adequate opportunity to address the relevant factual and legal issues, *see* Pet. 20-23, and the remaining procedural protections afforded defendants do not adequately protect the ability to comment on the contemplated conditions of supervised release, *see* Pet. 24-27.

In its Opposition, the government, like the Eleventh Circuit, relies on the first *Irizarry* factor, arguing that the discretion district courts have in imposing special conditions precludes defendants

from having any expectation subject to due process protection in connection with them. Opp'n at 6-7. As discussed in Moran's Petition, however, the question is not only whether defendants anticipate that some special conditions might be imposed, but whether they have adequate notice regarding the nature of the specific special conditions contemplated by the district court to be able to meaningfully comment on them. In this regard, there is a critical difference between the imposition of a variance and the imposition of a special condition: the decision to vary results in movement along a single axis – the number of months a defendant will be incarcerated – while there is almost no limit to the variety of special conditions a district court may impose. *See* Pet. 20-21 & n.1. *Irizarry*'s holding that parties can be expected to address at sentencing all issues that relate to the length of a defendant's sentence does not imply that parties should reasonably be expected to anticipate and respond to any special condition, no matter how unexpected.

The government claims that in most cases, attorneys will anticipate that special conditions will be imposed and be aware of the nature of those conditions based on the presentence report and the proceedings leading up to sentencing. Opp'n at 7-8. That is no doubt true in most cases. Moran does not propose, and no court has established, a rule that notice must be provided prior to the imposition of *any* special condition of supervised release. Instead, the Fifth, Seventh, Ninth, and Tenth Circuits have held

notice is required when a defendant would not reasonably be expected to anticipate a contemplated special condition, such as where it is not among the mandatory and discretionary conditions of supervised release and there is no nexus between the condition and the offense of conviction. *See* Pet. at 14-17. Under those circumstances, notice is necessary if the parties are to adequately address the factual and legal issues relating to such a condition.

Finally, the government argues that defendants' rights may be adequately protected by a continuance in those cases in which lack of notice has prejudiced the defendant, rather than a notice requirement. Opp'n at 9. The government's contention overlooks the reality of how sentencing proceedings are ordinarily conducted. In most cases, including this one, there is no indication prior to the pronouncement of sentence of what special conditions of supervised release might be imposed. As discussed in Moran's Petition, Pet. at 26-27, where the defendant has no reason to expect the special conditions imposed, "first to impose the sentence, and then to invite counsel to comment. . . . is no notice at all." *Wise*, 391 F.3d at 1033. The government makes no response to this point.

C. This case is an appropriate vehicle to resolve the conflict.

The government argues that this case would be a poor vehicle to address the conflict regarding the

notice issue on the theory the error was harmless. Opp'n at 10-11. According to the government, Moran's counsel should have anticipated the special conditions that were imposed and Moran was not prejudiced by lack of notice because he presented the same arguments in response to the conditions that were presented on appeal. *Id.* Neither contention holds up.

With regard to whether Moran's counsel should have anticipated the extensive sex offender special conditions that were imposed here, it bears noting that the conditions were unrelated to the offense of conviction and were imposed based on a single alleged sex offense that was remote in time, and for which sex offender treatment had already been imposed. *See* Pet. at 4. None of the five times Moran had been sentenced in the intervening thirteen years had resulted in the imposition of sex offender conditions. *Id.* at 5. Moreover, there was literally no connection between at least one of the conditions – the internet prohibition – and any alleged wrongdoing.

Further, the inability of Moran's counsel to adequately argue in opposition to the sex offender special conditions is precisely the prejudice Moran suffered. While Moran's counsel made some of the same factual arguments Moran raises on appeal, counsel represented that he had not researched the issue. App. 6, and his argument in opposition to the special conditions was without any supporting authority. As discussed in the Petition, the imposition of sex offender conditions based on a single thirteen-year-old

conviction was inconsistent with opinions of other circuits holding that a remote-in-time sex offense does not establish the necessary relationship between sex offender special conditions and the statutory sentencing factors. *See* Pet. at 29-34. Further, the internet prohibition was inconsistent with decisions from other circuits because there was no nexus between the condition and any wrongdoing by Moran and the condition was overbroad. Not surprisingly, Moran's counsel did not cite any of this authority or effectively make the arguments these decisions would have supported because he had no notice that sex offender special conditions were under consideration.

II. The Eleventh Circuit's holding that special conditions based on a single thirteen-year-old sex offense were reasonably related to the statutory sentencing factors conflicts with other circuits' decisions.

As discussed in Moran's Petition, the Eleventh Circuit's opinion also conflicted with opinions from the Sixth, Eighth, and Ninth Circuits interpreting the requirement of a reasonable relationship between special conditions and the statutory sentencing factors set forth in 18 U.S.C. Section 3553(a) and U.S.S.G. Section 5D1.3. The Eleventh Circuit's affirmance of sex offender special conditions based on a single thirteen-year-old sex offense conflicted with opinions of each of those courts holding that a single remote-in-time sex offense conviction does not

establish the necessary reasonable connection to the statutory sentencing factors. Pet. at 29-34.

The government does not take issue with the rule stated in the Sixth, Eighth, and Ninth Circuit cases Moran discussed in his Petition. Instead, it argues only that the Eleventh Circuit's opinion is distinguishable from the opinions Moran cites, based on other misconduct Moran has allegedly engaged in. Opp'n at 12-13. Moran discussed in his Petition the allegations the government relies on, and pointed out that they involve an unsubstantiated charge that did not result in a sex offense conviction and allegations that, if proven, do not constitute sex offenses. Pet. at 30-31 n.3. In several of the cases Moran cited for the proposition that a sex offense in the distant past is an insufficient basis for the imposition of sex offender special conditions, the defendants, like Moran, had in the interim engaged in other wrongdoing that were not sex offenses. *See United States v. Carter*, 463 F.3d 526, 532-33 (6th Cir. 2006); *United States v. T.M.*, 330 F.3d 1235, 1238 (9th Cir. 2003); *United States v. Scott*, 270 F.3d 632, 633 (8th Cir. 2001). These cases recognize that more recent wrongdoing will not "revive old offenses and justify the imposition of supervised release conditions related to sex offender status" where "the intervening actions . . . bear no significant relation to sex offender status." *T.M.*, 330 F.3d at 1240-41; *see also Carter*, 463 F.3d at 532-33. In sum, the Eleventh Circuit's opinion in this case directly conflicts with opinions of the Sixth, Eighth, and Ninth Circuits and is not distinguishable.

III. The Eleventh Circuit's holding that an internet prohibition is not a greater deprivation of liberty than necessary to achieve the statutory purposes of sentencing where there was no nexus between computers or the internet and wrongdoing by the defendant conflicts with other circuits' decisions.

The Eleventh Circuit's affirmance of a special condition prohibiting Moran from internet access without prior permission from his probation officer also conflicted with opinions of other circuits regarding the requirement that conditions of supervised release involve no greater deprivation of liberty than necessary to accomplish the statutory purposes of sentencing. Moran explained in his Petition that the Eleventh Circuit's opinion was inconsistent with the Second Circuit's holding in *United States v. Peterson*, 248 F.3d 79, 82-84 (2d Cir. 2001), that an internet prohibition is overbroad where, as here, there is no nexus between any wrongdoing by the defendant and computers or the internet. *See* Pet. at 35-36. In the months since Moran filed his Petition, two additional courts of appeal, the Third and Fourth Circuits, have required a connection between internet special conditions and the defendant's wrongdoing. *See United States v. Miller*, 594 F.3d 172 (3d Cir. 2010); *United States v. Smathers*, 2009 WL 3792421 (4th Cir. 2009) (unpublished). *Miller* was a child pornography case in which the district court prohibited internet access without the prior permission of the probation officer. 594 F.3d at 184-85. The Third Circuit stated that

among the "key factors" courts must consider in evaluating the reasonableness of an internet restriction is "the severity of the defendant's criminal conduct and the facts underlying the conviction, with a particular focus on whether the defendant used a computer or the internet to solicit or otherwise personally endanger children." *Id.* at 187. Accordingly, *Miller* reversed the internet prohibition and remanded for the district court's consideration of the restriction's "relationship to the facts underlying [the defendant's] conviction, particularly his use of the internet." *Id.* at 188. In *Smathers*, the Fourth Circuit held it was plain error to impose a condition forbidding internet access without prior permission of the probation officer on a defendant convicted of the sexual exploitation of minors. *Id.* at *1. The court stated that because the defendant's "crime did not involve a computer or the Internet" and there was no "evidence that [the defendant] has a history of using the computer or Internet to obtain or disseminate child pornography," the condition was "not reasonably related to the § 3553(a) factors . . . nor is it in line with the Sentencing Commission's policy statement recommending '[a] condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items' in committing a sex offense." *Smathers*, 2009 WL 3792421, at *1 (quoting § 5D1.3(d)(7)).

Moran further explained that the Eleventh Circuit's affirmance of this condition also conflicted with decisions of the Second, Third, Seventh, and Eighth

Circuits holding the precise condition imposed here – a prohibition against access to the internet without prior permission from the probation officer – to be overbroad even where there is some connection between the defendant's offense and the internet. *See* Pet. at 36-37. In response, the government cites cases upholding internet restrictions. Opp'n at 15-16. Each of the government's cases involved a direct connection between the defendant's offense and the internet. *United States v. Stults*, 575 F.3d 834, 855 (8th Cir. 2009) (internet used to commit child pornography offense); *United States v. Ristine*, 335 F.3d 692, 696 (8th Cir. 2003) (internet used to attempt "to arrange sexual relations with underage girls"); *United States v. Thielemann*, 575 F.3d 265, 278 (3d Cir. 2009) (defendant "utilized internet communication technologies to facilitate, entice, and encourage the real-time molestation of a child"); *United States v. Crandon*, 173 F.3d 122, 125 (3d Cir. 1999) (internet used to solicit minor).

The government also points out that, unlike the internet restrictions at issue in some cases, the condition here is limited in time and subject to the possibility of approval by the probation officer or modification by the district court, and does not affect Moran's livelihood. Opp'n at 16-17. That more restrictive internet restrictions are possible does not justify the imposition of an internet restriction in this case, in which the condition is unrelated to the defendant's conduct.

The government acknowledges that "[t]he courts of appeals have expressed differing views" regarding the circumstances under which special conditions restricting internet access are permissible, Opp'n at 17, but argues that review of conditions of supervised release is "highly fact-dependant" and therefore not an appropriate area for the Court's review. Opp'n at 18-19. The review necessary to determine that there has never been even an allegation Moran used the internet to engage in any form of wrongdoing is hardly "fact-intensive." Nor is the rule requiring a relationship between an internet restriction and the defendant's criminal history unduly complicated, and indeed is contemplated by the Sentencing Commission's policy statements. *See Smathers*, 2009 WL 3792421, at *1.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the Petition should be granted.

Respectfully submitted,

JAMES E. FELMAN
Florida Bar No. 0775568
KATHERINE EARLE YANES
Florida Bar No. 0159727
Counsel of Record
KYNES, MARKMAN & FELMAN, P.A.
100 South Ashley Drive, Suite 1300
Tampa, Florida 33602
Telephone: (813) 229-1118
Facsimile: (813) 221-6750

Counsel for Petitioner

Date: March 9, 2010